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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

STACEE COOTES, Plaintiff and Appellant, v. WYMAN PROPERTY MANAGEMENT, et al., Defendants and Respondents.	A153030 (Napa County Super. Ct. No. 16CV001108)

Plaintiff Stacee Cootes (Plaintiff) appeals from the trial court's order granting the defendants' special motion to strike pursuant to Code of Civil Procedure section 426.16, the anti-SLAPP statute.[1] Because we conclude the challenged acts do not arise from protected activity, we reverse.

BACKGROUND

Plaintiff owns a condominium unit in a 40-unit common interest development, Pear Tree Condominiums (the Development). Every homeowner in the Development is a member of the defendant Pear Tree Homeowners Association (the Association), which is governed by a five-member board of directors (the Board) made up of volunteer homeowners. Defendant Wyman Property Management contracts with the Association to

[1] "SLAPP" stands for "strategic lawsuits against public participation." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 615 (*Rand*).) All undesignated section references are to the Code of Civil Procedure.

provide property management services. We refer to Wyman Property Management and its president, defendant Mindy Wyman, as WPM. We refer to the Association and WPM collectively as Defendants.[2]

The Development's declaration of covenants, conditions, and restrictions (CC&Rs) sets forth the respective maintenance obligations of the Association and the individual homeowners. As relevant here, homeowners are responsible for the maintenance and repair of their own units, including "the equipment and fixtures in the Unit and its interior walls," while the Association is responsible for the maintenance and repair of common areas. The Association's maintenance and other obligations are paid for by homeowner assessments.

Plaintiff's complaint alleges that in December 2014, she notified Defendants about a plumbing leak in her unit. Plaintiff asserts the source of the leak was in a Development common area and was therefore the Association's responsibility; Defendants claim the leak was not in a common area and was therefore Plaintiff's responsibility. Neither Plaintiff nor Defendants repaired the leak, mold began to grow, and Plaintiff alleges she suffered adverse health effects from the mold. The issue was discussed at a December 2015 Board meeting, where the Board declined to use Association funds to repair the leak because it continued to believe the leak was Plaintiff's responsibility. In 2016, the Association became concerned that the mold would spread to surrounding units and, after notifying Plaintiff it would charge her for the work, had the mold remediated (and, presumably, the leak repaired).

Plaintiff's complaint also includes allegations about a leak and mold in her carport. The Association repaired other carports in the Development and it appears undisputed that the maintenance and repair of the carport is the Association's responsibility. The Association did repair Plaintiff's carport, but Plaintiff argues the repair was not timely and there is still mold in the carport.

[2] Plaintiff also sued a member of the Board. While this appeal was pending, Plaintiff reached a settlement with the Board member and the appeal as to her has been dismissed.

Finally, Plaintiff's complaint alleges she has been overcharged for electricity because faulty wiring caused her to be billed for electricity used by adjacent units. Plaintiff has complained to the Association and WPM but neither has taken action. Defendants claim Plaintiff experienced high electricity bills because she has an appliance that uses a large amount of electricity.

Plaintiff filed the underlying lawsuit alleging claims for negligence, breach of contract, fraud, premises liability, and breach of fiduciary duty. The Association filed an anti-SLAPP motion arguing Plaintiff's entire complaint should be stricken. WPM joined the Association's motion and filed its own anti-SLAPP motion. The trial court granted both motions in their entirety.

DISCUSSION

I. *Notice of Appeal*

WPM argues Plaintiff failed to appeal the order granting its anti-SLAPP motion and the appeal therefore should be dismissed as to it. WPM points to the following: the trial court's minute order granted the Association's anti-SLAPP motion and WPM's "request for joinder"; Plaintiff's notice of appeal identified the date of the minute order as the date of the appealed-from order; after Plaintiff filed her notice of appeal, the trial court issued an order granting both the Association's and WPM's motions to strike; and Plaintiff never filed an amended notice of appeal appealing from this subsequent order.

"The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment." (Cal. Rules of Court, rule 8.104(d)(2).) Both anti-SLAPP motions were heard on the same day. The trial court's minute order granted the Association's anti-SLAPP motion and WPM's request for joinder, and did not deny WPM's anti-SLAPP motion. The minute order indicates the trial court's intent to grant Defendants' requested relief.[3] We may, and do, exercise our discretion to treat Plaintiff's

[3] WPM filed one document noticing both the joinder and the anti-SLAPP motion.

notice of appeal as filed immediately after entry of the court's order granting both Defendants' motions to strike.

II. *Anti-SLAPP Motion*

"The procedure made available to defendants by the anti-SLAPP statute has a distinctive two-part structure. [Citations.] A court may strike a cause of action only if the cause of action (1) arises from an act in furtherance of the right of petition or free speech 'in connection with a public issue,' and (2) the plaintiff has not established 'a probability' of prevailing on the claim. (§ 425.16, subd. (b)(1) . . . .)" (*Rand, supra,* 6 Cal.5th at pp. 619–620.) "A defendant satisfies the first step of the analysis by demonstrating that the 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16]' [citation], and that the plaintiff's claims in fact *arise* from that conduct [citation]." (Rand, at p. 620.)

"We review de novo the grant or denial of an anti-SLAPP motion. [Citation.] We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity." (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067.)

A. *Issue of Public Interest*

Defendants primarily argue Plaintiff's claims arise from conduct protected under section 425.16, subdivision (e)(3), "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest," and (e)(4), "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Both categories of protected activity require the conduct be made in connection with an issue of public interest. As we will explain, we conclude none of the challenged conduct was made in connection with an issue of public interest, and therefore was not protected activity under subdivision (e)(3) or (e)(4).

1. *Legal Background*

"Not surprisingly, we have struggled with the question of what makes something an issue of public interest. [Citation.] . . . We share the consensus view that 'a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest,' and that '[a] person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.' " (*Rand, supra,* 6 Cal.5th at p. 621.) Three "nonexclusive" categories of conduct involving a matter of public interest are "when the statement or conduct concerns 'a person or entity in the public eye'; . . . when it involves 'conduct that could directly affect a large number of people beyond the direct participants'; and . . . when it involves 'a topic of widespread, public interest.' " (*Ibid.*)

As Defendants argue, issues of interest to most or all members of a homeowners association have been held matters of public interest for purposes of an anti-SLAPP motion. (See *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 131 (*Colyear*) [" ' "public interest' within the meaning of the anti-SLAPP statute has been broadly defined to include, in addition to government matters, " 'private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity' " ' "].) However, " '[i]n cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance.' " (*Ibid.*)

For example, in *Colyear*, *supra*, 9 Cal.App.5th 119, the plaintiff sued his homeowners association and a neighbor, challenging conduct relating to whether the plaintiff's lot was subject to a tree-trimming covenant that burdened the original lots in the development but was not expressly imposed on lots that were subsequently added, such as the plaintiff's. (*Id.* at pp. 124–127.) The Court of Appeal found that at the time

of the challenged action, "there was an ongoing controversy, dispute, or discussion regarding the applicability of tree-trimming covenants to lots not expressly burdened by them, and the [homeowners association's] authority to enforce such covenants. While the evidence in the record is somewhat sparse, it is sufficient to show that the issue was an ongoing topic of debate between the board and homeowners, resulting in multiple hearings, letters, and several changes to the board's policy on the matter starting as early as 2002 and continuing up to the current dispute." (*Id.* at pp. 132–133.)

Similarly, in *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468 (*Damon*), the homeowners association had previously hired a professional management company and then chose to become self-managed, hiring the plaintiff. (*Id.* at p. 471.) "[M]any homeowners" subsequently became "displeased with [the plaintiff's] management style and wanted to return to professional management." (*Id.* at p. 472.) The issue "split [the homeowners] into two camps" and there was a "highly emotional atmosphere surrounding this dispute." (*Ibid.*) The challenged statements giving rise to the plaintiff's claims involved this dispute, which the Court of Appeal found was a matter of public interest: "These statements pertained to issues of public interest within the [development] community. Indeed, they concerned the very manner in which this group of more than 3,000 individuals would be governed—an inherently political question of vital importance to each individual and to the community as a whole." (*Id.* at p. 479; see also *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 540 (*Lee*) [challenged conduct involved the approval of a "roofing project, which affected multiple buildings in [the development]," and the determination of "which management entity was responsible for the day-to-day operations of [the homeowners association and the development]," issues that "impacted a broad segment, if not all, of [the association's] members"]; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1470 (*Ruiz*) [challenged

conduct involved the homeowners association's "governance and enforcement of its architectural guidelines, issues of concern to the many [association] members"].)[4]

However, not all disputes between a homeowner and a homeowners association are matters of public interest. For example, in *Turner v. Vista Pointe Ridge Homeowners Assn.* (2009) 180 Cal.App.4th 676 (*Turner*), the owners of a lot sued the homeowners association over the association's refusal to grant a variance for certain improvements on the property and over its conclusion that certain other improvements were not in conformity with the association's "architectural guidelines." (*Id.* at p. 680.) The Court of Appeal distinguished authority finding an issue of interest to homeowners association members was a matter of public interest: "the underlying litigation here . . . simply pertains to the interaction between homeowners and a homeowners association with respect to the homeowners' desired improvements. We are given no reason to believe that this is of interest to any homeowners other than the [plaintiffs] and the one neighbor whose view may be affected by the height of [one of the improvements]." (*Id.* at p. 684; see also *Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722, 734 (*Talega*) [statement about homeowners association's liability for certain repairs did not involve a matter of public interest because "there was no controversy about the issue"].)

The parties dispute the appropriate characterization of the challenged conduct, but it is undisputed that they related to three matters: the plumbing leak, the carport repair, and the allegedly faulty wiring. We consider whether each of these was a matter of public interest.

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[4] We note the development communities in these cases have a substantially greater number of units than the Development, which has only 40 units. (*Colyear, supra,* 9 Cal.App.5th at p. 125 [approximately 750 lots]; *Lee, supra,* 6 Cal.App.5th at p. 531 ["440 town houses"]; *Ruiz, supra,* 134 Cal.App.4th at p. 1461 ["over 523 lots"]; *Damon, supra,* 85 Cal.App.4th at pp. 471, 479 ["1,633 homes" and "more than 3,000 individuals"].) It is an open question as to "what limitations there might be on the size and/or nature of a particular group, organization, or community" for purposes of the public interest requirement. (*Ruiz,* at p. 1468.) We will assume, without deciding, that the Development's 40 units is a community of sufficient size.

2. *Plumbing Leak*

Plaintiff argues the challenged conduct related to the plumbing leak did not involve a matter of public interest, but was simply a private dispute between herself and the Association over whether the source of the leak was in a common area or not. The Association argues it was a matter of public interest because Plaintiff "wanted Association funds, comprised of members' assessments, to cover repairs to her Unit," which "could substantially raise members' assessments if the Association suddenly assumed what were previously member responsibilities." WPM similarly contends that a homeowners association's determination of "what expenses to cover and pay from common funds are matters of 'public interest.' "

Defendants rely on *Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110 (*Ivie*). In *Ivie*, the homeowners association historically took the position that, under the governing documents, individual homeowners were "responsible for repair and replacement of balconies and shingle siding on their units." (*Id.* at p. 1113.) After an election installing new board members, the association adopted the opposite interpretation, concluding the association was responsible. (*Ibid.*) Some members, including the defendant, disagreed with the new interpretation, and the association sought "declaratory relief as to the interpretation of [its] governing documents." (*Ibid.*) The Court of Appeal found the dispute involved a matter of public interest, noting the association's "new position on this issue impacted all members of the association, whether or not their homes had balconies or were in need [of] siding repair, because the expenses would now be borne by all." (*Id.* at p. 1118.)

Ivie is distinguishable. The dispute in that case involved whether the association or individual homeowners were responsible for a certain category of repairs under the governing documents, and would thereby shift to the association a cost previously borne by individual homeowners. Here, the parties agree that the governing documents oblige the Association to repair leaks in common areas and oblige individual homeowners to repair leaks in their units. The dispute thus will not move an entire category of maintenance obligations from one party to the other, as it did in *Ivie*. Instead, the dispute

was over the source of Plaintiff's leak: was it in a common area or not? To be sure, if the source of the leak was in a common area, the Association would bear the cost of the repair. But only this single repair was at issue, and the Association submits no evidence that the cost of the repair would have had a substantial impact on its finances and therefore its members.[5] We do not read *Ivie* to hold that every dispute with any impact on a homeowners association's funds, no matter how small, constitutes a matter of public interest. (See *Rand, supra,* 6 Cal.5th at p. 625 ["[W]e reject the proposition that any connection at all—however fleeting or tangential—between the challenged conduct and an issue of public interest would suffice to satisfy the requirements of section 425.16, subdivision (e)(4)."].)

In addition, although the public interest analysis in *Ivie* did not expressly discuss whether the topic was one of ongoing debate in the development, elsewhere the opinion noted the underlying dispute was between the association and "some of its members." (*Ivie, supra,* 193 Cal.App.4th at p. 1112.) This indicates the issue was debated by more than just the defendant and the association's board. In contrast, there is no evidence that the source of Plaintiff's leak was discussed by anyone other than Plaintiff and Defendants. (*Colyear, supra,* 9 Cal.App.5th at p. 131 [" '[I]n cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance.' "].)

Defendants note that Plaintiff wrote online reviews and letters to other homeowners and a newspaper reporter. Many of these communications do not discuss the leak at all (or the carport or electricity issues). Those that do may be evidence that Plaintiff attempted to make the issue one of public interest, but they are not evidence that

[5] The Association submitted evidence that the mold remediation cost approximately $30,000, but there is no evidence of what repairing the initial leak would have cost.

she was successful (apart from the owners of adjacent units, some of whom became concerned about the spread of mold to their units).

In sum, "[w]e are given no reason to believe that this is of interest to any homeowners other than the [Plaintiff] and [the neighbors who may be affected by the spread of mold]." (*Turner, supra,* 180 Cal.App.4th at p. 684.) Plaintiff's plumbing leak was not a matter of public interest.

3. *Carport Repair and Faulty Wiring*

The challenged conduct relating to the carport repair and the alleged faulty wiring similarly do not involve matters of public interest. There is no dispute that the Association was responsible for the carport repair; instead, the issue was whether it should have repaired Plaintiff's carport before other carports and whether the repair was properly completed. There is also no dispute that Plaintiff should not be paying for electricity used by other units; the issue is whether she is, as she contends, or is not, as Defendants contend. There is no evidence that either of these issues impacted anyone other than Plaintiff and the Defendants (other than Plaintiff's immediate neighbors), or that any other homeowners were debating or discussing them. They are not matters of public interest.[6]

B. *Official Proceeding*

WPM also argues Plaintiff's claims arise from a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," and/or a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(1) & (2).) We disagree.

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[6] Our analysis is consistent with the two-step process recently outlined by the Supreme Court in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133. Because we conclude none of the challenged conduct involved a matter of public interest, we need not decide whether, as the parties dispute, the other requirements of section 425.16, subdivision (e)(3) and (e)(4) were met.

First, WPM contends "HOA [homeowners association] meetings have been characterized as 'official proceedings.' " However, the case relied on by WPM declined to decide whether section 425.16, subdivision (e)(1) or (e)(2) applied to claims arising from a homeowners association's conduct of its meetings, finding a different subdivision applied. (*Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 418.) WPM does not mention *Talega, supra*, 225 Cal.App.4th 722, which squarely held "homeowners association meetings fall outside the scope of official proceedings" for purposes of the anti-SLAPP statute. (*Id.* at p. 732.) *Talega* reasoned that "nongovernmental proceedings must have a strong connection to governmental proceedings to qualify as 'official.' " (*Ibid.*) "[A]lthough courts have recognized the similarities between a homeowners association and a local government, even going so far as to describe a homeowners association as a 'quasi-governmental entity, paralleling the powers and duties of a municipal government' [citation], a homeowners association is not performing or assisting in the performance of the *actual* government's duties" and their decisions "are not reviewable by administrative mandate"—characteristics of other entities found to hold "official proceedings" for purposes of the anti-SLAPP law. (*Ibid.*) We agree with *Talega* that homeowners association board meetings are not "official proceedings" within the meaning of the anti-SLAPP law. (But see *Golden Eagle*, at p. 418 [declining to decide the issue]; *Colyear, supra,* 9 Cal.App.5th at p. 130 [same].)

Second, WPM asserts that Plaintiff's lawsuit was filed in part as an "attempt to avoid foreclosure."[7] "The subjective intent of a party in filing a complaint is irrelevant in determining whether it falls within the ambit of section 425.16." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1521.)

Finally, WPM appears to argue that Plaintiff's claims arise from Defendants' acts that were taken in anticipation of her future lawsuit. (See *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 944 ["actions based on prelitigation statements or writings may be

[7] Plaintiff's complaint alleges that she stopped paying Association dues after losing her job because of health problems and the Association sent her a notice of default.

within the SLAPP statute"].) We fail to see how the challenged acts from which Plaintiff's claims arise—Defendants' failure to fix the plumbing leak, to promptly and completely repair the carport, and to repair the assertedly faulty wiring—were made "in contemplation of or in preparation for the defense of litigation," as WPM asserts.[8]

DISPOSITION

The order is reversed. Appellant is awarded her costs on appeal.

[8] Because we are reversing the trial court's order granting Defendants' anti-SLAPP motion, we decline Defendants' requests for attorney fees on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A153030)